STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL S. PNIEWSKI,

Plaintiff-Appellant,

v

SHERRI L. MORLOCK and ROBERT J. MORLOCK,

Defendants-Appellees.

UNPUBLISHED
June 5, 2003

No. 238767
Oakland Circuit Court
LC No. 01-652284-DP

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(5) and MCR 2.116(C)(8). We affirm.

Defendants Sherri and Robert Morlock (hereinafter "Sherri" and "Robert," respectively) were married in 1990 and Rebekah Marie Morlock (hereinafter "Rebekah") was born in 1997. The Morlocks divorced in 2000. A consent judgment of divorce awarded Robert joint legal custody of Rebekah with specific rights of parenting time.

Plaintiff alleges that he was involved in an intimate relationship with Sherri during the time that she conceived Rebekah, and that Sherri told him that he (plaintiff) was Rebekah's biological father. In 2001, plaintiff filed a complaint against both Sherri and Robert for paternity, custody, and parenting time of Rebekah. Both defendants filed motions for summary disposition, claiming that plaintiff lacked standing to file his complaint. The trial court granted the motions, and plaintiff appealed.

I

This Court reviews a trial court's decision to grant summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Likewise, statutory interpretation involves a question of law which this Court also reviews de novo. *Dessart v Burak*, 252 Mich App 490, 494; 652 NW2d 669 (2002). In the present case, the trial court granted defendants' motions for summary disposition under MCR 2.116(C)(5) and MCR 2.116(C)(8) on the basis that plaintiff lacked standing under the Paternity Act, MCL 722.711 *et seq.*

This Court's review of a determination regarding a motion under MCR 2.116(C)(5), which asserts a party's lack of capacity to sue, requires consideration of "the pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Wortelboer v Benzie Co*, 212 Mich App 208, 213; 537 NW2d 603 (1995). On the other hand, a motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim as pleaded. This Court must take all factual allegations and reasonable inferences supporting the claim as true. "The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998). Consequently, this Court's de novo review in the instant case requires drawing all inferences in the light most favorable to plaintiff, and then determining if plaintiff either pleaded or established facts that would give him standing to sue. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000).

II

The trial court held that plaintiff lacked standing to bring suit under MCL 722.714 because he could not meet either of the two requirements of MCL 722.711(a). The court relied on the interpretations of the Paternity Act in *Girard v Wagenmaker*, 437 Mich 231; 470 NW2d 372 (1991), and *McHone, supra*, in reaching its conclusion. Plaintiff argues on appeal that the trial court's reliance on *Girard* was misplaced for a number of reasons, none of which we find persuasive.

The issue in *Girard* was whether the plaintiff, a putative father, had standing to bring an action under the Paternity Act as it existed in 1985, to determine the paternity of a child born while the mother was legally married to another man. *Girard, supra* at 234. In resolving this issue, the Supreme Court focused on the statutory language of MCL 722.714(f)[1] and MCL 722.711(a), which at the time the plaintiff filed his complaint in 1985, read, in relevant part, as follows, respectively:

> *The father or putative father of a child born out of wedlock may file a complaint in the circuit court* in the county in which the child or mother resides or is found, praying for the entry of the order of filiation as provided for in section 7.

[1] We note that although the *Girard* Court repeatedly refers to the relevant provision as "MCL 722.714(6)," a review of the legislative history of the Paternity Act indicates that at the time the plaintiff in that case filed his complaint (e.g., 1985), the provision was numbered as MCL 722.714(f). It was not until the 1986 amendment that subsection (f) was renumbered as subsection (6), and as the *Girard* Court noted, although the 1986 amendment would have been in effect at the time *Girard* was decided, it would have been inapplicable to the plaintiff's case. It appears, therefore, that the Supreme Court may have inadvertently referred on several occasions to the relevant provision as MCL 722.714(6), when in fact it was applying MCL 722.714(f), which other than the renumbering, was virtually the same.

> "Child born out of wedlock" means a child begotten and born to a woman who was not married from the conception to the date of birth of the child, or *a child which the court has determined to be a child born during a marriage but not the issue of that marriage.* [*Girard, supra* at 237.]

A

There is no question in this case that Rebekah was conceived and born while the defendants were married to each other and that there is no court determination that she is not the issue of the marriage. Under *Girard*, therefore, plaintiff clearly has no standing to prosecute this action. However, on appeal plaintiff argues that because the Paternity Act has been amended "numerous" times since the Michigan Supreme Court construed the Paternity Act in *Girard*, the *Girard* Court's interpretation of the statute as it relates to the issue of standing for putative fathers, is inapplicable to the present case. The amendments cited by plaintiff have not materially changed the Paternity Act, and *Girard's* interpretation of the statute is still good law.

B

The Legislature is presumed to act with knowledge of appellate court statutory interpretations. *Karpinsky v Saint John Hosp-Macomb Ctr Corp,* 238 Mich App 539, 545; 606 NW2d 45 (1999). Furthermore, changes in statutory language are generally presumed to reflect a change in meaning. *Id.* Accordingly, this Court must assume that when the Legislature deleted subsection (7) from MCL 722.714 in 1994, it was aware of the Supreme Court's decision in *Girard.* However, this Court has also recognized that changes in statutory language may reflect an attempt to clarify the meaning of a provision rather than change it. *Ettinger v Lansing,* 215 Mich App 451, 455; 546 NW2d 652 (1996).

On review of the post-*Girard* amendments to the Paternity Act, we conclude that the Legislature's actions were meant to clarify the meaning of the statute rather than change the way it was interpreted in *Girard.* The amended language merely expands the applicability of the standing provision to include not only the mother, but also the father or putative father.[2] However, the Legislature left *unchanged* the definitions of a "child" and a "child born out of wedlock". Therefore, plaintiff in this case would have standing only if Sherri was not married from the conception to the date of birth of Rebekah, *or* if there had been a prior court determination that Rebekah was not an issue of that marriage. Simply put, the child in question must be one who was born out of wedlock for plaintiff to have standing. *Girard, supra.* This is consistent with the *Girard* Court's construction of the statute, despite the amendments.

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[2] This interpretation is supported by the language of subsection (1) of MCL 722.714, which provides that an action under the Paternity Act can be brought by "*the mother, the father,* a child who became 18 years of age after August 15, 1984 and before June 2, 1986, or the family independence agency as provided in this act." MCL 722.714. The requirements for the family independence agency are slightly different. See MCR 722.714 generally.

We also reject plaintiff's assertion that the timing of the amendments after the *Girard* decision demonstrated the Legislature's dissatisfaction with the Supreme Court's interpretation of the standing requirement under the statute. We conclude that if it was merely the Legislature's intent to convey to the courts its discontent with the judicial construction of the statute regarding a putative father's standing, the Legislature would have only found it necessary to delete or change the language in the subsection that it believed had been misconstrued by the Court, rather than to delete the entire subsection. Further, the well-settled rule providing that when an amendment is enacted soon after controversies arise regarding the meaning of the original act, "'it is logical to regard the amendment as a legislative interpretation of the original act . . . .'" *Detroit Edison Co v Revenue Dep't*, 320 Mich 506, 520; 31 NW2d 809 (1948), is not applicable to the present case because the 1996 amendment came more than five years after *Girard*. We conclude that the Legislature's acts, or lack thereof, with respect to the language interpreted by the *Girard* Court for five years following the decision could reasonably be construed as the Legislature being in accordance with the judicial interpretation of the statute.

Finally, as noted, the Legislature left unchanged the definition of a "child" and a "child born out of wedlock," which ultimately led the *Girard* Court to conclude that the plaintiff did not have standing. Contrary to plaintiff's assertion, this is further evidence of the Legislature's intent that there remain a connection between the putative father's standing under the Paternity Act, and the requirement that the child involved be one that was born out of wedlock as defined by the Paternity Act.

We hold that although the Legislature has amended MCL 722.714 several times since the Supreme Court's decision in *Girard*, the statutory changes have not materially altered the *Girard* holding that standing under the Paternity Act depends on a finding that the child was born out of wedlock as defined in MCL 722.711(a). Based on the documentary evidence submitted by the parties, the trial court properly granted defendants' motions for summary disposition based on plaintiff's lack of standing. It is clear that plaintiff cannot satisfy either clause of the definition of a child born out of wedlock.

Rebekah was conceived and born during the Morlock's marriage and there is no indication in the record that there was a prior determination by the court, at the time plaintiff filed his complaint or at any other time, that Rebekah was not an issue of the marriage. In fact, both Robert and Sherri adamantly maintain that Robert is Rebekah's biological father, and that Robert had "access" to Sherri during the period of time in which she got pregnant. The consent judgment of divorce, which was a determination of the court, listed Rebekah as a child of the marriage, as evidenced by the court awarding joint legal custody of Rebekah, as well as parenting time, to Robert. Even taking all factual allegations and reasonable inferences supporting plaintiff's claim as true, because plaintiff lacks capacity to sue, his claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. We hold, therefore, that the court properly granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(5) and MCR 2.116(C)(8).

III

Citing *Hoshowski v Genaw*, 230 Mich App 498; 584 NW2d 368 (1998), and *Opland v Kiesgan*, 234 Mich App 352; 594 NW2d 505 (1999), plaintiff also argues that the case law development since *Girard*, has rendered that case "virtually meaningless," by negating the policy considerations underlying the *Girard* decision. We disagree.

A

In *Hoshowski*, the defendant mother appealed to this Court from an order of filiation that deemed the plaintiff to be the father of the defendant's daughter. *Id.* at 499. The defendant argued that pursuant to *Girard*, the plaintiff lacked standing to seek the order of filiation because the defendant was married from the time of conception to the time of birth. *Hoshowski, supra* at 499. The parties had properly executed an affidavit of paternity when the child was born in 1995 and this Court held that the plaintiff's paternity was established "for all purposes" unless he was proved not to be the father by clear and convincing evidence. *Id.* at 501.

Here, plaintiff has presented no affidavit acknowledging paternity, and thus, MCL 722.714(2) is inapplicable to this case. Further, this Court in *Hoshowski*, did not "negate" the policy considerations underlying *Girard* and as a matter of fact, engaged in no discussion of the *Girard* decision except to note that the defendant mother was claiming lack of standing pursuant to that decision. Because MCL 722.214(2) enabled the father to establish paternity without first having to establish that he had standing under MCL 722.214(7), it was unnecessary for this Court to apply *Girard.*

B

Plaintiff also relies on *Opland*, in which the plaintiff mother, who was married at the time of conception and throughout her pregnancy, filed for divorce shortly after giving birth to her daughter. *Id.* at 355. At the time of her divorce, she asserted that her husband was the father of her child. *Id.* The plaintiff's husband did not contest this assertion, and a judgment of divorce was entered designating him as the child's father. *Id.* at 355-356. Later, a consent order was entered modifying the original divorce judgment based on stipulations by plaintiff and her ex-husband that the child was conceived when the two were separated and contemplating divorce, and that the plaintiff's husband "had no access" to the plaintiff during that time. *Id.* at 357. The amended judgment of divorce stated that based on these stipulations, the court had determined that the child was not an issue of the marriage, even though she was conceived and born during that time. *Id.* On the plaintiff's appeal, this Court concluded that the properly entered amended divorce judgment qualified as a sufficient prior determination under *Girard*, to allow the plaintiff to overcome the presumption that a child born during the marriage is the issue of that marriage. *Opland, supra* at 360.

The facts of *Opland,* make it readily distinguishable from the present case. In this case, there has been no amended judgment of divorce in which the trial court determined that Robert was not Rebekah's father. Neither Robert nor Sherri has alleged, as the *Opland* plaintiff and her husband did, that they were separated or contemplating divorce during the period of time in which Sherri conceived Rebekah. Further, as mentioned above, unlike the husband in *Opland,*

Robert claims to have had "access" to Sherri during the conception period. We note that the *Opland* Court did in fact apply *Girard* as good law, reaffirming the continued viability of the standing requirement set out in *Girard.*

Neither *Hoshowski* nor *Opland* supports plaintiff's argument that case law development since *Girard*, negates the policies underlying that decision. Because plaintiff in this case was unable to successfully rebut the presumption of legitimacy, the trial court properly granted defendants' motions for summary disposition.

IV

Plaintiff argues that the facts of the present case are materially different from those in *Girard* and as a result, *Girard* is inapplicable to the case at hand. More specifically, plaintiff contends that this case is distinguishable because, here, there is no intact marriage to preserve because defendants are already divorced, and there existed a relationship between plaintiff and Rebekah that would have continued to flourish had Sherri not terminated contact. We find plaintiff's argument unpersuasive. Although the facts of *Girard* may be distinguishable from those of the present case, we find that the factual distinctions between the two cases are immaterial since this Court has previously reaffirmed *Girard* in *McHone, supra*, a case involving facts similar to those in the present case.

V

Plaintiff also argues that summary disposition was premature in this case because discovery had not been completed. Generally, a motion for summary disposition is premature when discovery on a disputed issue has not been completed. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). However, summary disposition before the close of discovery is appropriate if there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Id.*

In this case, Sherri and Robert were entitled to summary disposition based on plaintiff's lack of standing and plaintiff fails to show how further discovery would support a finding that plaintiff has standing. Thus, there is no indication that there is any reasonable chance that further discovery will result in factual support for plaintiff since without standing, plaintiff's claim fails as a matter of law. Accordingly, we hold that despite it being before the completion of discovery, summary disposition in this case was appropriate.

VI

Plaintiff's final issue on appeal is that the Paternity Act, by precluding standing to bring a paternity action, deprives him of his fundamental liberty interest as a parent to have a relationship with his child, in violation of constitutional due process and equal protection guarantees. Although the trial court did not address this issue, whether a party has been deprived of due process or equal protection guarantees is a question of constitutional law which we review de novo. *In re Carey*, 241 Mich App 222, 226; 615 NW2d 742 (2000).

A

With respect to due process, plaintiff contends the Paternity Act deprives him of a fundamental right without the benefit of procedural or substantive due process. We disagree. In *Hauser v Reilly*, 212 Mich App 184, 186-187; 536 NW2d 865 (1995), this Court considered the plaintiff's argument that the *Girard* Court's interpretation of the Paternity Act deprived him of his right to due process under the Michigan Constitution by denying him standing to seek an order of filiation and visitation rights.

Applying *Hauser* to the instant case, we hold that plaintiff has failed to establish a protected liberty interest. Unlike in *Hauser*, in this case, there has been neither a determination, nor a concession by Sherri, that plaintiff is the natural father of Rebekah. In fact, in her affidavit, Sherri averred that she did not contest the presumption that Rebekah was the product of her marital relationship with Robert. Other than plaintiff's allegation that he is Rebekah's biological father, there is no evidence refuting the presumption that Rebekah is the natural child of Robert. Thus, plaintiff has failed to establish a biological link with Rebekah. Without such a link, under *Hauser* plaintiff does not have a protected liberty interest as a putative father, since the derivation of such an interest requires the *combination* of a biological link *and* an established parent-child relationship. See *Hauser, supra* at 187-188. Moreover, even assuming that plaintiff is Rebekah's biological father, and that he had established some level of a relationship with Rebekah, this Court's decision in *McHone*, nonetheless precludes a finding that plaintiff has a protected liberty interest in his relationship with Rebekah.

In *McHone*, this Court noted that there was evidence that the plaintiff had established some degree of a relationship with the child. Notwithstanding this fact, this Court declined to apply the reasoning in *Hauser* regarding a putative father's liberty interest in the parenting of his child as dictum. *McHone, supra.* This Court concluded that it was best to leave such a determination for the Supreme Court of Michigan, as "[t]he barrier provided by the Supreme Court in *Girard*, cannot be hurdled in this Court." *McHone, supra* at 679-680.

B

"The equal protection guarantees require that persons under similar circumstances be treated alike. Equal protection does not require that persons under different circumstances be treated the same." *Hauser, supra* at 189. With respect to equal protection, plaintiff argues that the Paternity Act, by treating putative fathers differently based on the mother's marital status at the time of the child's conception and birth, or based on whether there was a prior court determination, violates the equal protection guarantees.

In *Hauser*, this Court explained that although the Paternity Act treats biological parents differently, the statutory classification is not based solely on gender, but also on the complainant's ability to satisfy the statutory requirements of a child born out of wedlock. *Id.* Thus, this Court in *Hauser* concluded that the Paternity Act does not treat persons under similar circumstances differently. *Id.* at 190. Rather, it permissibly treats persons under different circumstances differently. As in *Hauser*, Plaintiff's circumstances differ significantly from those of Sherri and Robert and it does not violate equal protection guarantees to treat them differently.

Plaintiff asserts that because a fundamental right (i.e., the natural parent-child liberty interest) is involved, the strict scrutiny test is applicable, and thus, the Paternity Act cannot be construed as precluding a putative father from obtaining standing unless the classifications used are justified by a compelling state interest. Based on our due process analysis above concluding that plaintiff does not have a protected liberty interest, we hold that no fundamental right is implicated in this case. Thus, application of the strict scrutiny test is unwarranted. Nonetheless, as previously discussed, until the Legislature expresses otherwise, there is a compelling state interest in preserving the family unit, as well as in protecting the legitimacy of children born during the marriage. We hold, therefore, that the Paternity Act did not deprive plaintiff of due process or equal protection guarantees, and summary disposition was properly granted.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Michael J. Talbot